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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CC Docket No. 92-297

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In the Matter of)
)
Rulemaking to Amend Parts 1, 2, 21 and 25)
of the Commission's Rules to Redesignate)
the 27.5 - 29.5 GHz Frequency Band, to)
Reallocate the 29.5 - 30.0 GHz Frequency)
Band, to Establish Rules and Policies)
for Local Multipoint Distribution Service)
and for Fixed Satellite Services)

COMMENTS OF THE JOINT PARTIES

Cox Enterprises, Inc., Comcast Corporation, and Jones Intercable, Inc.

(collectively the "Joint Parties") hereby submit their comments on the Commission's Third Notice of Proposed Rulemaking and Supplemental Tentative Decision in the above captioned rulemaking proceeding.^{1/}

I. INTRODUCTION

The Commission's rulemaking on 28 GHz began in response to petitions by entrepreneurs interested in using the band to provide multichannel video programming and two-way voice and data services.^{2/} This proceeding has had several iterations; the

^{1/} See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band, to Reallocate the 29.5 - 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Third Notice of Proposed Rulemaking and Supplemental Tentative Decision, CC Docket No. 92-297 (released July 28, 1995) ("Notice").

^{2/} See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint

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Commission previously sought industry comment on service rules and on the possible sharing of the 28 GHz band with satellite users.^{3/} The current Notice proposes that the band be split between several different types of services, one service being Local Multipoint Distribution Service ("LMDS"). LMDS has the potential to be a powerful new service with a range of competitive applications. The Joint Parties support the Commission's decision to move forward with the 28 GHz docket, and support releasing this spectrum through the competitive bidding process using Basic Trading Area ("BTA") markets.

Comments filed earlier in the LMDS rulemaking show that LMDS can be employed for a range of uses, including telephony and video, and the Joint Parties agree with the Commission that particular narrow uses of LMDS spectrum should not be chiseled in stone.^{4/} The Joint Parties also believe that the Commission should not pre-determine which entities will hold LMDS spectrum by foreclosing potential competitors from bidding in any LMDS auction.

The Notice resurfaces a question raised in earlier stages of this rulemaking proceeding, namely whether cable operators should be allowed to bid on LMDS spectrum in

^{2/} (...continued)

Distribution Service, Notice of Proposed Rulemaking, Order, Tentative Decision and Order on Reconsideration, 8 FCC Rcd 557, 558 (1993) ("First Notice").

^{3/} See Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, Second Notice of Proposed Rulemaking, 9 FCC Rcd 1394 (1994).

^{4/} "New providers will offer facilities-based competition to each other and traditional cable and telephone carriers -- greatly enhancing customer choice. A wealth of innovative services will include two-way video, teleconferencing, telemedicine, telecommuting, data services and global networks." Notice at ¶ 2.

areas overlapping their cable franchise areas. An analysis of the market and the public interest plainly demonstrates that cable operators should qualify to hold LMDS spectrum.

II. THE COMMISSION CORRECTLY OBSERVES THAT THERE ARE NO LEGAL OR POLICY PROHIBITIONS ON CABLE OWNERSHIP OF LMDS

Section 613 of the Communications Act prohibits a cable operator from holding a Multichannel Multipoint Distribution Service ("MMDS") license in any portion of the franchise area served by the cable operator's cable system.^{5/} The Notice correctly concludes that this cable - MMDS cross-ownership ban does not prohibit a cable operator from holding an interest in an LMDS licensee in the operator's franchise area.^{6/}

Despite the attempts of some commenters on the First Notice to stretch the language of the cable - MMDS cross-ownership ban to encompass LMDS, the Joint Parties agree with the Commission that the Section 613 ban is limited to MMDS.^{7/} If Congress intended to include LMDS in a cross-ownership ban it would have done so with specific language.^{8/} Similarly, if Congress wanted a general ban on cable operator ownership of other video transport media, it would have enacted a more general cross-ownership ban.

^{5/} 47 U.S.C. § 533(a)(2).

^{6/} Notice at ¶ 104.

^{7/} See Notice at ¶ 104.

^{8/} As the Notice observes, the Commission granted a license to provide video service in the New York PMSA using LMDS technology in January, 1991. Consequently, Congress could have been aware of LMDS when it enacted the 1992 cable - MMDS cross-ownership ban in the same way that it was aware of DBS, another emerging video delivery technology. See Notice at ¶ 104 n.104.

Congress did neither. The cable - MMDS cross-ownership ban is narrowly tailored and applies only to cable ownership of MMDS. Consequently, there is no legal or statutory impediment on cable - LMDS ownership.

Likewise, there is no policy impediment to cable - LMDS ownership. As the Commission observes in the Notice, LMDS is suitable for a wide range of two-way, interactive applications.^{9/} MMDS, in contrast, is a one-way transmission service with a limited geographic range. Because MMDS is a receive-only service, its usefulness is limited to media such as video entertainment where customers need not interact with each other or with their service providers.

LMDS's two-way capabilities, however, will permit LMDS licensees to provide customers with broadband interactive services such as telephony. Indeed, CellularVision, the only currently licensed LMDS operator, has reported to the Commission that LMDS is capable of providing telephone service to 75% - 90% of the population of the United States.^{10/} While many LMDS licensees might ultimately choose to use their spectrum to provide a range of video services, the Commission, properly recognizing the broad potential of LMDS, has declined to pre-determine the uses of LMDS. Consequently, there are no

9/ For example, the Notice states that LMDS "joins services traditionally provided by separate communications service providers, such as cable television, telephony, video communications, data transfers, and interactive transactions of all types." Notice at ¶ 28.

10/ Notice at ¶ 29, citing ex parte notice letter, Michael Gardner, P.C., to William Caton, Acting Secretary, Federal Communications Commission, March 16, 22, and 28, 1995, attachment, page 2.

policy reasons to restrict cable ownership of a service that has significant uses beyond video programming.

Further, even if LMDS technology were limited to the provision of video entertainment services, which it is not, the considerations that led Congress to enact the MMDS cross-ownership ban are not present with LMDS. The cable television industry is facing increasing competition from DBS, wireless cable, LEC cable and LEC video dialtone systems. In 1992, when the ban was enacted, several competing video service technologies were in development but were not ready to provide service to customers. The competitive landscape for video services today is entirely different from the competitive landscape in 1992, and changes will be accelerating over the next few years. DBS is now a viable competitor in the consumer home video services market, and is aggressively advertising to attract new customers as well as existing cable customers. Commercial video dialtone cable systems are being deployed in some of the largest urban markets in the country, and the LECs are actively pursuing entry into video through video dialtone, wireless cable, and cable system overbuilds. Any cable industry market power that might have justified the imposition of the cable - MMDS cross-ownership ban in 1992 no longer exists. Cable has no market power in the LMDS market and no incentive to quash LMDS as a pro-competitive market force. A cable - LMDS cross-ownership ban would not enhance competition, and indeed it would inhibit competition by foreclosing an entire industry from participation in LMDS.^{11/}

^{11/} In the recently created General Wireless Communications Service ("GWCS"), another service that may potentially be used to provide interactive video, voice and data services, the Commission saw no need to restrict ownership by any class of entities. See Allocation of
(continued...)

III. ANY LMDS OWNERSHIP RESTRICTIONS MUST BE APPLIED EQUALLY

Regulatory parity for similarly situated service providers and the promotion of competition have properly been the focus of numerous recent Commission decisions.^{12/} The Notice recognizes that LMDS "may provide services that compete with local exchange carriers in the provision of local exchange service, and with cable operators in the provision of video programming,"^{13/} and has asked for comment on three different regulatory schemes to best promote LMDS competition.^{14/} Because of the wide range of potential applications for LMDS, no one type of service provider, including cable operators, should be singled out and classified as ineligible to bid.

Despite the Notice's numerous acknowledgements that LMDS can be used to provide both video and telephony services, the Notice asks for comment on whether cable operators should be prohibited from acquiring LMDS licenses for BTAs that overlap a cable

11/ (...continued)
Spectrum Below 5 GHz Transferred from Federal Government Use, Second Report and Order, ET 94-32 (released August 2, 1995).

12/ See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348 (1994).

13/ Notice at ¶ 27.

14/ The three different regulatory alternatives are 1) a presumption of common carrier regulation under Title II; 2) a "bidder's choice" whereby successful bidders indicate and explain under which Commission regulatory scheme their proposed service falls; and 3) a licensee option to be either a common or a private carrier. Notice at ¶¶ 94 - 96. The Joint Parties believe that any of these regulatory schemes could be successful.

operator's franchise area.^{15/} Comparing the size of the average BTA and the average cable franchise, there is little question that cable operators will have de minimis overlap, and de minimis market power for any service provided throughout an entire or substantial portion of a BTA, which is much larger than a franchise area.

The 1995 Commercial Atlas and Marketing Guide, published by Rand McNally, lists 487 BTAs nationwide.^{16/} These 487 BTAs contain over 11,000 different cable franchises,^{17/} and the New York BTA alone is served by over 30 different cable operators.^{18/} Obviously a BTA covers a substantially wider area than the typical cable franchise, making any "concern" about cable - LMDS cross-ownership unjustified. Because the typical cable franchise area is so small relative to a BTA, LMDS used as a video medium could help a cable operator obtain a broader geographic reach, thus spurring competition with existing and future multichannel video and telecommunications providers.^{19/}

Further, as the Notice acknowledges, "LMDS spectrum might be an important adjunct to cable operator facilities that can be used in the provision of local telephone services in competition with LECs."^{20/} Many cable operators are in the planning stages or just

^{15/} Notice at ¶ 105.

^{16/} See Notice at ¶ 88.

^{17/} Warren Publishing, Inc., Television & Cable Factbook, Vol. 63 at iv (1995).

^{18/} See Warren Publishing, Inc., Cable & Station Coverage Atlas (1995).

^{19/} The protected service areas for MMDS licensees, in contrast, are typically smaller than a single metropolitan area.

^{20/} Notice at ¶ 106.

becoming involved in telephony services. Many cable systems, however, will require extensive modification before they can offer two-way broadband service. LMDS can be a valuable tool for new telephony entrants, a tool that should be available without discrimination to the cable industry.

Cable operators can be an important class of bidders in any LMDS auction, and cable operators can be significant competitors in the telephony and expanded video business. The cable industry has demonstrated a willingness and a facility for experimentation and innovation both in the types of services offered and in achieving technological breakthroughs. It can be expected that cable operators would bring that same entrepreneurial spirit to LMDS. Cable's participation in LMDS should therefore be encouraged.

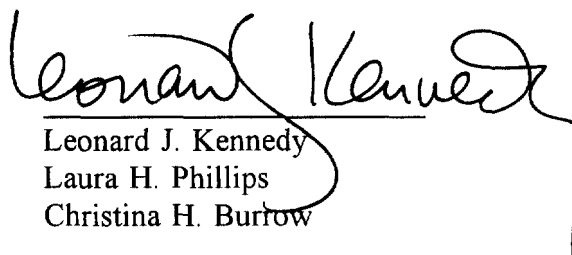
IV. CONCLUSION

LMDS is a service with many potential uses. The Commission must allow full unrestricted cable participation in LMDS. The Joint Parties support the Commission's proposed use of competitive bidding on a BTA basis to allocate LMDS spectrum, but only if all types of entities are permitted to bid. As the Notice acknowledges, there are no statutory or legal impediments to cable ownership of LMDS. Further, a public policy analysis of the market and the public interest demonstrates that cable is facing vigorous and growing competition in the video services market. LMDS could enhance current cable reach and offerings, as well as assist cable's deployment of telephony services. Cable operators are seeking to enter the telephony industry, and LMDS provides a vehicle competitors can use to

challenge the LEC local loop monopoly. The Joint Parties urge the Commission to finalize its tentative conclusion in favor of full unrestricted cable participation in LMDS.

Respectfully submitted,

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